IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8513 OF 2006

Shri Raghunath Krishna Shirole ..Petitioner
(Orig.Plaintiff-Appellant)
Versus

1. Shri Shivaji Santu Thube
2. Shri Balu Santu Thube
3. Shri Kondaji Runja Thube ..Respondents
(Orig.Defendants-Respondents)

Mr. M.M. Sathaye for the Petitioner
Mr. Vinay San Pal for the Respondent Nos. 1 to 3

CORAM : S.R.SATHE,J.
DATED : 10/09/2007

ORAL ORDER :-

1. Petitioner-the original Plaintiff in Special Civil Suit No.195 of 1988 has preferred this Petition against the order passed by the Additional District Judge, Nashik below Exh-14 in Civil Appeal No.121 of 1993 whereby the application filed by the Original defendants-respondents in Civil Appeal No.121 of 1992 for preferring counterclaim for possession of the suit land, by way of amendment to the original Written Statement was allowed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendants'.

2. The brief facts giving rise to this Writ Petition are as under :-

The suit land described in detail in paragraph-

1 of the plaint had come to share of Santu Runja Thube, father of the original defendant Nos.1 and 2 in partition between Santu and his brother. By virtue of an agreement to sale dated 20/11/1976, Santu agreed to sell the suit property to the Plaintiff for Rs.8000/- by accepting earnest amount of Rs.2000/-. Thereafter, on 29/11/1977, Plaintiff paid additional amount of Rs.1700/- to Santu. Santu had agreed to obtain permission from Revenue Authority for alienation. Subject to the said condition, sale was to be completed within a period of 3 years. Unfortunately, Santu died before completing the sale leaving behind two sons namely defendant Nos. 1 and 2. As they were minor, they started residing with their uncles i.e. defendant No.3. As defendant Nos. 1 and 2 were minors Plaintiff did not file any suit for specific performance. From the date of agreement, Plaintiff was in possession of the suit land. According to Plaintiff, he also made improvements in the suit land and for that purpose spent amount of Rs.20,000/-. Thereafter, Plaintiff filed Special Civil Suit No.195 of 1988 against the defendant Nos. 1 to 3 for specific performance of an agreement to sale.

3. The said suit was opposed by the defendants. They contended that the suit land was the joint family

property and Santu alone had no right to enter into an agreement to sale and the sale agreement was not binding on the defendants. They also took the contention that the suit is barred by law of limitation. The defendants, therefore, prayed for the dismissal of the suit.

4. Prior to the filing of the above mentioned suit Kondaji Runja Thube, uncle of defendant Nos. 1 and 2 and who was impleaded as defendant No.3 in Special Civil Suit No.195 of 1988 had filed Regular Civil Suit No.1052 of 1987 on 18/11/1987 against the Plaintiff for declaration, injunction and possession of the suit land. He had also claimed possession on the ground that suit land was the joint family property and Santu had no right to enter into an agreement to sale.

5. Both the above mentioned suits were tried together and were decided by common judgement. The learned Trial Judge came to the conclusion that the suit land was allotted to the share of Santu in partition and as such the defendant No.3 was not concerned with the suit land on the date of agreement to sale. The Trial Judge also held that the agreement regarding sale was not entered into for legal necessity

and the same is not binding on defendant Nos. 1 and 2. Considering all these facts and circumstances, the Trial Court felt that Plaintiff was not entitled for Specific Performance of an agreement to sale though, Plaintiff was ready and willing to perform his part of the contract. The learned Trial Judge, therefore, directed the defendant Nos. 1 and 2 to return the amount of Rs.3,700/- received towards the consideration of the suit land. The Trial Judge dismissed the suit filed by defendant No.3.

6. As the decree for specific performance was refused, original Plaintiff filed Civil Appeal No.121 of 1993. In that appeal, the Respondent-Original defendant Nos. 1 and 2 filed an application Exh-14 and submitted that the Trial Court has wrongly held that the suit land was allotted to the share of Santu and therefore, dismissed the suit for possession filed by defendant No.3.

7. According to defendant Nos. 1 and 2, in order to avoid multiplicity of proceedings between the parties, it was necessary to amend the Written Statement and prefer counterclaim for possession of the suit land. They, therefore, prayed that if the Courts

come to the conclusion that partition of the joint family property was effected and defendant No.3 was not the 'Karta' of family then Plaintiff be directed to hand over the possession of the suit land to defendant Nos.1 and 2 by way of counterclaim.

8. The said application was opposed by the Plaintiff. He contended that the amendment sought by the defendant was inconsistent with original stand taken by the defendants in the Written Statement. Besides this, the amendment ought to have been sought during the pendency of the suit. As the suit is already decided against the defendants they are trying to make out a new case. The Plaintiff also contended that the proposed amendment of counterclaim is barred by law of limitation. Hence, on all these grounds, the Plaintiff prayed for the dismissal of the said application.

9. After hearing the arguments of both the sides, learned Additional District Judge found that though, suit for specific performance was dismissed, Plaintiff was in possession of the suit land. So, in order to avoid the multiplicity of the suits, he allowed the application for amendment and also directed that the Plaintiff may file rejoinder to the counterclaim.

10. The above mentioned order is challenged by the original Plaintiff in this Petition. In this Petition before me, Shri M.M. Sathaye, learned Advocate for the Petitioner, original Plaintiff has urged two points. Firstly, he submitted that proposed amendment by way of counterclaim was made at a very late stage and even during the pendency of the appeal. It would take away the valuable right created in favour of Plaintiff and as such, the same should not have been allowed. Secondly, he canvassed before me that the counterclaim made by way of amendment was barred by law of limitation. According to him, Plaintiff was put in possession in the year 1976. So, counterclaim for possession made in the year 1999 was not in time. The learned Advocate for the defendant Nos.1 and 2 submitted that when the Trial Court directed the defendant Nos. 1 and 2 to return the amount of earnest money, he should have asked the Plaintiffs to return the possession of the suit lands to the defendant Nos.1 and 2. So, now situation will arise whereby the Plaintiff would remain in possession of the suit land without paying a farthing to the defendants and defendants will be required to file another suit. Hence, in order to avoid multiplicity of the suits

amendment sought by the defendants was necessary and it has been rightly allowed by the learned Additional District Judge.

11. The only point which falls for my consideration is whether the order to permit the defendant Nos. 1 and 2 to prefer the counterclaim by way of amendment is legal and correct.

12. It is needless to say that by virtue of the proposed amendment, the defendant Nos. 1 and 2 want to take alternate plea that if it is held that partition has taken place between Santu and his brothers and defendant No.3 is not entitled for possession, then it is necessary in the interest of justice to return the possession of the land to defendant Nos.1 and 2 they being owners. This amendment is sought as a counterclaim. So, naturally, one has to take into consideration the provisions of Order-6, Rule-17 as well as the provisions of Order-8, Rule-6(A) of the Code of Civil Procedure. All amendments ordinarily are required to be allowed which satisfy the two conditions. First not causing injustice to other side, and second of being necessary for the purpose of determining the real question in controversy between

the parties. It is also well settled that by virtue of amendment party should not be allowed to make out a new and inconsistent case. As in the instant case, amendment sought is in the nature of counterclaim, it would be worthwhile to see the relevant provisions of Order-8, Rule-6(A).

> ***" 6-A. Counterclaim by defendant -(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counterclaim against the claim of the Plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not:***
>
> ***Provided that such counterclaim shall not exceed the pecuniary limits of the jurisdiction of the Court.***
>
> ***(2) Such counterclaim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counterclaim.***
>
> ***(3) The plaintiff shall be at liberty to file a written statement in answer to the counterclaim of the defendant within such period as may be fixed by the Court.***
>
> ***(4) The counterclaim shall be treated as a plaint and governed by the rules applicable to plaints."***

13. In the instant case, while deciding whether amendment by way of counterclaim is to be allowed or not it must be borne in mind that admittedly since the

date of agreement Plaintiff was in possession of the suit land the said fact was known to the defendants. Though, they opposed the Plaintiff's suit for specific performance of an agreement to sale, they did not prefer the counterclaim at that stage when they filed Written Statement. It appears that after the time the suit for possession filed by defendant No.3 was dismissed holding that partition of the joint family property had already taken place and the suit land was allotted to the share of Santu, the defendant Nos. 1 and 2 have filed the present application for amendment or counterclaim in the appeal filed by the Plaintiff.

14. It is needless to say that object of enacting Rule-6A is to reduce the multiplicity of proceedings by providing that causes of action and cross-claim similar in nature can be clubbed together and disposed of by common judgement. Under order-8, Rule-6A once a suit has been filed the defendants can set up by way of counterclaim against the claim of the Plaintiff, any right or claim in respect of cause of action accrued in to the defendant against the Plaintiff either before or after filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired.

15. Shri Sathaye, learned Advocate for the Plaintiff argued before me that in the instant case defendant Nos. 1 and 2 have themselves stated in their amendment application Exh-14 that defendant No.3 had claimed possession of the suit land by filing regular civil suit No.1052 of 1987. However, the Court has held that partition between Santu i.e. the father of defendant Nos. 1 and 2 and their brothers had already taken place and the land was allotted to the Santu's share and therefore dismissed the suit for possession filed by defendant No.3 and so in order to avoid multiplicity of suit it has become necessary to carry out the amendment. Thus, according to him, even according to defendants, the cause of action for the amendment has arisen subsequent to the decision of 1052 of 1987 and hence, it can not be allowed in view of the provisions of Order-8, Rule-6A of CPC. It is true that as per above provisions counterclaim can be preferred if the cause of action for the same has arisen prior to the filing of Written Statement and not subsequent to it. In fact, in a case **Ram Swaroop Versus Mandir Thakran Kalyan Rai AIR 2002 Himachal Pradesh 27** it was held that application for counterclaim filed in Appellate Court is not maintainable if no steps were

taken to file counterclaim before the Trial Court. However, facts of the said case and the facts of the case in hand are different. In that case, apart from the fact that steps were not taken in the Trial Court in filing counterclaim when it was sought it was time barred. However, in the instant case, it is not so, in fact when the Plaintiffs filed suit for specific performance and alternatively claimed that if relief for specific performance is not granted then the defendants be directed to return the amount of earnest money and the defendants filed the Written Statement by way of alternative plea the defendants could have pleaded that if they are directed to refund the earnest money the possession of the land be directed to be handed over to defendants. So, the cause of action for the counterclaim had in fact arisen at that time. Merely because the defendants failed to plead accordingly and raised the said point subsequently that does not mean the cause of action for the counterclaim arose subsequently. The Court has to decide from the facts and circumstances of the case as to when the cause of action for particular relief had arisen. Some times, parties belief or contention in that behalf may not be correct but that is not the criteria to determine when the cause of action has arisen.

Considering the peculiar facts and circumstances of the case, I have no hesitation to hold that cause of action for taking such plea regarding return of possession of the suit land or counterclaim in that behalf had in fact arisen the moment plaintiff said that if he is not entitled for purchase of the land and for specific performance, the defendant should be directed to refund the earnest money. So, in the instant case, the amendment sought by the defendants can not be rejected technically by saying that the cause of action for the said counterclaim has arisen subsequent to the decision of the suit.

16. Incidentally, it must also be noted that when the present Plaintiffs filed the suit for specific performance against defendant Nos. 1 to 3, the defendant No.3 had already filed the suit for possession against the present Plaintiff wherein it was alleged that Santu had no right to sale the suit property as the suit property was of joint family. It has to be noted that in the special civil suit No.195 of 1988 the defendant had filed joint Written Statement and in a way they had adopted all the allegations in the suit No.1052 of 1987. So, pith and substance of their contention in the special civil suit No. 195 of

1988 was that Plaintiff is not entitled for purchase of the land and the possession of the same has to be given to the defendants.

17. It must be noted that when the Trial Court came to the conclusion that Plaintiff is not entitled to get specific performance and is only entitled to get the refund of earnest money and accordingly, directed defendant Nos. 1 and 2 to refund the earnest money, as a naturally corollary of the same he could have directed the Plaintiffs to return the possession of the suit land to the defendants. In fact, the learned Trial Judge has observed in his Judgement.

> ***"However, the Plaintiff has failed in proving that the agreement was made by deceased for lawful purposes viz. legal necessity, payment of antecedents etc. That is why, the agreement is found to be not binding upon the Defendant Nos.1 and 2, who have had vested right and interest (undivided) alongwith their father in suit fields. It has further been found that specific performance of contract as regards undivided share of deceased Santu can not be practically granted. Having regard to the property in question, it seems practically impossible to enforce agreement only as regards deceased Santu's undivided interest. Therefore, the suit so far as main relief of specific performance of contract is concerned fails in entirity. The alternative relief of only refund of Rs.3,700/- should be granted. For the reasons already given above, no amount could be granted for the breach of***

contract or towards improvement of land. Similarly interest is not payable because the Plaintiff is in possession of the suit field. As regards, the other suit R.C.S. No.1052 of 1987, the same must fail because Kondaji does not have any right or concern with the suit fields and in reality Defendant Nos.2 and 3 in S.C.S. No.195 of 1988 are owners but are not Plaintiffs in that suit. That may, if advised take appropriate action for getting possession, which in any case can not be granted in this matter in the absence of any counter claim from them."

18. In the instant case, we must know that basically the defendant Nos.1 and 2 are seeking amendment in the Written Statement. By the proposed amendment they want to take specific plea that in case it is held that their contention is not true and the land is not of joint family and it was of Santu then it be returned to defendant Nos. 1 and 2. There is no rule or law that amendment can not be sought at appellate stage. The defendant has right to take alternative pleas in defence by way of amendment but subject to the satisfaction that :-

(i) proposed amendment should not result any injustice to the other side;

(ii) any admission made in favour of Plaintiff should not be withdrawn and;

(iii) inconsistent and contradictory allegation which

negate admitted facts should not be raised.

In the instant case, by no stretch of imagination, it can be said that the present defendants are making out any new and inconsistent case. Since beginning it is their contention that Plaintiff is not entitled for specific performance and consequently the possession. So, when defendant Nos. 1 and 2 have been directed to refund the earnest money and if Plaintiff is allowed to have possession of the land also then it creates from anomalous position. It amounts to allowing the Plaintiff to retain the land of defendant Nos. 1 and 2 without paying any consideration for the same. In other words, it would in fact amount to unjust enrichment to Plaintiff and it would result in gross injustice to the defendant Nos.1 and 2. It is pertinent to note that even the Plaintiff had also taken it for granted that if decree for specific performance is not passed in his favour then obviously he will be required to return the land to defendant and that was rightly so, in fact that is why he pleaded in the plaint that if specific performance is not granted then he should also get amount of Rs.6000/- towards the improvement made by him in the land. Not only that but he goes a step further and says that if he decides to purchase the land like the suit land then he will be required to spend additional amount of Rs.20,000/- and as such

defendants be also directed to pay additional amount of Rs.20,000/-. So, it is quite evident that even Plaintiff was aware that if decree for specific performance was not passed then it would be necessary to return the possession of the land to the defendant Nos.1 and 2. So, having regard to these facts and circumstances, there is no propriety in saying that for the possession of the land defendant Nos. 1 and 2 may file separate suit. We can not ignore the fact that the present litigation is going on for last 18 years. If amendment as proposed is not allowed then certainly, there would be another round of litigation and the very object of Order-6, Rule-17 and Order-8 Rule-6A will be defeated. So, it is necessary to allow the amendment as prayed.

19. I am conscious of the fact that counterclaim is required to be disposed off alongwith the suit and here the suit is already disposed off. However, once we came to the conclusion that proposed amendment is necessary then the Trial Court can even now be asked to consider the counterclaim and give its finding. So, merely because as per the provisions of Order-8, Rule-6A, it is contemplated that suit and counterclaim have to be decided simultaneously, in the instant case, it can not

be said that the amendment can not be allowed. The peculiar facts and circumstances of this case certainly warrant to allow the amendment in the Written Statement as proposed by the defendant Nos. 1 and 2. If such amendment is allowed no prejudice is likely to be caused to the Plaintiff. The defendants are certainly not making out any new or inconsistent case. The proposed counterclaim for possession is within 12 years from the filing of the suit. It is not the case of Plaintiff that he has become owner by adverse possession. The proposed counterclaim is not barred by limitation. So, I am of the view that the order passed by the learned Additional District Judge allowing application Exh-14 i.e. amendment to Written Statement by way of counterclaim is legal and valid. Hence, I pass following order :-

O R D E R

1. Writ Petition is dismissed.

2. If either of the party to the Civil Appeal No.121 of 1993 desires that the counterclaim be decided by the Trial Court then the Additional District Judge to remand the case to the Trial Court only for that purpose otherwise, additional District Judge to consider the said counterclaim in Civil Appeal No.121 of 1993 according to law.

3. Under the circumstances of the case, parties to bear their own costs of this Petition.

(S.R.SATHE,J.)